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Paper No. 10

THOMAS W. HANSON, LLC
3990 S. CHEROKEE ST.
ENGLEWOOD, CO 80110

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OFFICE OF PETITIONS

In re Application of :
Richard Naimish : DECISION ON PETITION
Application No. 09/765,174 :
Filed: January 18, 2001 :
Attorney Docket No. Roh-N :

This is a decision on the "PETITION UNDER 37 CFR 137(A) FOR REVIVAL OF AN ABANDONED APPLICATION WHERE THE DELAY WAS UNAVOIDABLE," filed March 1, 2004.

The petition is DISMISSED.

Any request for reconsideration must be submitted within **TWO (2) MONTHS** from the mail date of this decision. Extensions of time under 37 C.F.R. § 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 C.F.R. § 1.137(a)" or "Renewed Petition under 37 C.F.R. § 1.137(b)," as appropriate.

The above-identified application became abandoned for failure to file a timely and proper reply to the non-final Office action mailed November 20, 2002. This Office action set a three-month shortened statutory period for reply, with extensions of time obtainable under § 1.136(a) or (b). No reply having been received, the above-identified application became abandoned on February 21, 2003. A Notice of Abandonment was mailed on December 17, 2003.

In response, petitioner filed the instant petition. Therein, petitioner submitted evidence to show that a response was timely deposited into the Express Mail service of the United States Postal Service on February 13, 2003. However, petitioner acknowledges that the Express mail number was not, as required for a showing of timely deposit under § 1.10, entered on the original transmittal, but rather was affixed to the file copy.

Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable:

The word 'unavoidable' . . . is applicable to ordinary human affairs, and requires no more or greater care or diligence

than is generally used and observed by prudent and careful men in relation to their most important business. It permits them in the exercise of this care to rely upon the ordinary and trustworthy agencies of mail and telegraph, worthy and reliable employees, and such other means and instrumentalities as are usually employed in such important business. If unexpectedly, or through the unforeseen fault or imperfection of these agencies and instrumentalities, there occurs a failure, it may properly be said to be unavoidable, all other conditions of promptness in its rectification being present.

In re Mattullath, 38 App. D.C. 497, 514-15 (1912) (quoting Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 USPQ 666, 667-68 (D.D.C. 1963), aff'd, 143 USPQ 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913). In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). Finally, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was "unavoidable." Haines v. Quigg, 673 F. Supp. 314, 316-17, 5 USPQ2d 1130, 1131-32 (N.D. Ind. 1987).

As a "reasonably prudent person" would file papers or fees in compliance with 37 CFR 1.8 or 1.10 to ensure their timely filing in the USPTO, as well as preserve adequate evidence of such filing, a delay caused by an applicant's failure to file papers or fees in compliance with 37 CFR 1.8 and 1.10 does not constitute "unavoidable" delay. See Krahn v. Commissioner, 15 USPQ2d 1823, 1825 (E.D. Va. 1990). Here, petitioner has some evidence that a paper, including a \$126 fee, was deposited in the USPS on February 13, 2003. In fact, the \$126 fee is, of record, in the application with a mailroom date of February 13, 2003. However, given that the Express Mail number was not placed on the amendment, petitioner does not have adequate evidence of the timely filing of the amendment in compliance with § 1.10. Moreover, the Office considers the filing of correspondence under 37 CFR 1.10 without the number of the "Express Mail" mailing label thereon an oversight that can be avoided by the exercise of reasonable care, requests for waiver of this requirement will not be granted on petition. Absent persuasive evidence that the amendment was filed in compliance with § 1.10, the delay in replying is not found "unavoidable" within the meaning of § 1.137(a).

Petitioner is not precluded from seeking revival of this application under 37 CFR 1.137(b)¹.

¹ A grantable petition under § 1.137(b) must be accompanied by: (1) the reply required to the outstanding Office action or notice, unless previously filed; (2) the petition fee set forth in 37 C.F.R. § 1.17(m); (3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unintentional; and (4) any terminal disclaimer (and fee as set forth in § 1.20(d)) required pursuant to § 1.137(d).

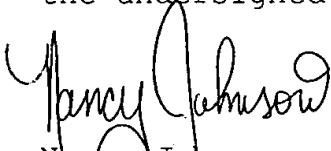
Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petition
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

By FAX: (703) 872-9306
ATTN: NANCY JOHNSON
SENIOR PETITIONS ATTORNEY

By hand: CUSTOMER SERVICE WINDOW
2011 South Clark Place
Crystal Plaza Two Lobby
Arlington, VA 22202

Telephone inquiries related to this decision may be directed to the undersigned at (703) 305-0309.



Nancy Johnson
Senior Petitions Attorney
Office of Petitions